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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	
REEXAMINATION OF THE POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS	GC Docket No. 92-52 RM-7739 RM-7740 RM-7741

To: The Commission

Joint Reply Comments Of
John A. Carollo, Jr., Friendship Communications, Ltd., JAM FM Limited Partnership, Chanel Broadcasting, Palm Tree FM Limited Partnership, Craig L. Siebert, WEDA, Ltd., Columbia FM Limited Partnership, and O'Day Broadcasting, Ltd.

John A. Carollo, Jr., Friendship Communications, Ltd., JAM FM Limited Partnership, Chanel Broadcasting, Palm Tree FM Limited Partnership, Craig L. Siebert, WEDA, Ltd., Columbia FM Limited Partnership, and O'Day Broadcasting, Ltd. (collectively the "FM Applicants"), pursuant to Section 1.415(c) of the Commission's Rules, 47 C.F.R. § 1.415(c), hereby submit their Reply Comments in response to the Commission's Second Further Notice of Proposed Rulemaking in GC Docket No. 92-52, 9 FCC Rcd 2821 (1994) (hereinafter the "Second Notice").[1/]

Interest Of The FM Applicants

The FM Applicants are all pending applicants for construction permits for new FM stations and filed Initial Comments in response to the Second Notice.

1/ These Reply Comments by the FM Applicants are timely filed. *See, Order*, DA 94-836, released August 1, 1994, in the above-captioned proceeding, in which the General Counsel's office, acting pursuant to delegated authority, extended the date for reply comments to and until August 22, 1994.

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The Commission raised the issue in the Second Notice of how to treat pending applicants following the D.C. Circuit's decision in Bechtel v. F.C.C., 10 F.3d 875 (D.C. Cir. 1993). The Court in Bechtel did not address the issue of how the Commission should treat applications that were pending at the time it declared the Commission's integration criterion arbitrary and capricious. In these Reply Comments, the FM Applicants will address certain contentions of other commenting parties regarding the issue of retroactive use of new criteria for evaluating applications and whether pending applicants should be allowed to amend in response to such new criteria.

The Commission Does Not Have Authority to Engage In Retroactive Rulemaking.

As the FM Applicants have previously noted, the Commission generally lacks the statutory authority for retroactive rulemaking. The Administrative Procedure Act generally prohibits administrative agencies from engaging in retroactive rulemaking unless Congress expressly delegates the power to promulgate retroactive rules. *See* Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). The Communications Act, as amended, the basis from which the Commission derives its authority to engage in rulemaking proceedings, does not grant the FCC authority in this instance to apply retroactively new comparative licensing standards.

The Commission's 1965 Policy Statement, which the D.C. Circuit invalidated in Bechtel, was not adopted pursuant to notice and comment rulemaking. Policy Statement on Comparative Broadcast

Hearings, 1 FCC 2d 393 (1965). The Commission intended the Policy Statement as a compilation of the various factors previously enunciated in Commission adjudications for selection from applicants for new broadcast stations. Thus, the Commission did not retroactively apply any new criteria by rulemaking -- it merely codified in one document criteria that had evolved through adjudication over time. Changes and refinements in those criteria, such as the decisions to grant enhancement credits for minority and female ownership, or to minimize the impact of differences in programming proposals, have been made by adjudication, not rulemaking.

When an agency proceeds to change rules through adjudication, as opposed to notice and comment rulemaking, the agency has considerably more ability to act to change rules retroactively. In SEC v. Chenery Corp., 332 U.S. 194 (1946), the Supreme Court upheld the Securities and Exchange Commission's ("SEC") Order applying new standards of conduct that had not previously been included in the SEC's legislative rules. In upholding the SEC's Order, the Supreme Court cautioned that, as much as possible, administrative agencies should develop new standards of conduct through notice and comment proceedings (when an administrative agency has the ability to proceed "through the exercise of its [rulemaking] powers, it has less reason to rely upon *ad hoc* adjudication ..."). Chenery, 332 U.S. at 202. However, the Supreme Court refused to preclude administrative agencies from acting by an individual order. Chenery 332 U.S. at 203. The Supreme Court

further stated "[t]hat such action might have a retroactive effect was not fatal to its validity." Id. This Commission's actions in refining interpretations of the 1965 Policy Statement over its nearly 40-year history were all previously by adjudication and had the effect of changing standards on a retroactive basis.

However, the agency has now chosen to proceed by rulemaking. Therefore, the Commission must accept the attendant constraints against retroactive rules.[2/]

Applicants in Pending Proceedings Should Be Allowed to Amend Their Applications.

The FM Applicants endorse the position of commenting parties such as Barbara Marmet (Comments, p. 6, ¶ 9), who support granting applicants the opportunity to amend within a reasonable period of

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[2/] In Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1555 (D.C. Cir. 1987), which as the FM Applicants previously noted was decided before Bowen, the D.C. Circuit upheld a Commission decision to retroactively apply lottery procedures upon cellular applicants who, at the time they filed their applications, were subject to comparative hearings. In upholding the retroactive employment of lottery procedures *in lieu* of comparative hearings, the Court concluded that "the 'ill effect' of the lottery's retroactive effect is little or none, and [ ] the 'mischief' caused by prohibiting retroactive effect would be significant...." Id. at 155. Even assuming *arguendo* the distinctions between the instant situation and the facts in Maxcell did not exist, *see* FM Applicant Comments, pp. 3-4, n. 3, the "ill effects" caused to and "mischief" imposed on applicants who have already filed and undergone evaluation, as have all the FM applicants, by the retroactive imposition of new comparative standards, would be considerable. Although the cellular applicants in MSAs 31-90 had filed before the imposition of new criteria, they were all on notice of the consideration of the use of lotteries by the Commission for selection of cellular authorizations. By contrast, each of the FM Applicants filed in response to filing window notices that specifically recited that application would be by comparative hearing, without any notice that the Commission intended a wholesale change in the procedures for evaluation of those applications.

time from the adoption of new comparative evaluation standards.[3/]

The FM Applicants all relied in good faith upon the Commission's evaluation procedures that existed at the time they filed their applications and still await final Commission decision on which entity will be awarded a broadcast license. To change the evaluation criteria but prevent applicants from amending their applications, as suggested by some commenting parties (Trans-Columbia Communications, p. 5; National Broadcasting Company, p. 1), would be fundamentally unfair to applicants that spent considerable sums in preparation and prosecution of applications in reliance upon existing comparative criteria, and furthermore, as noted above, be contrary to principles of administrative law.

If the Commission decides to adopt new comparative standards that would apply to new and pending applicants alike, fairness dictates that pending applicants should be granted an opportunity to amend their applications to coincide with the new rules. This is consistent with the Courts' opinions because the Commission is in the process of adopting general rules that would apply across the board, rather than individual, *ad hoc* decisions, and these general rules would have a substantially detrimental effect upon applicants in pending proceedings.

Commenting parties who oppose allowing parties to amend their pending applications argue that to allow such amendments would

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[3/] Marmet proposes that amendments be filed within 30 days from the date that new comparative standards become a final Commission action. (Marmet Comments, p. 6).

provide parties with an opportunity to restructure their applications so as to enhance their comparative standing. Some comments suggest that this would lead to the creation of sham organizations. See, e.g., Comments of Trans-Columbia Communications at p. 5. However, if the Commission were to allow pending applicants to amend, the applicants would still be required to adhere to the same standards of truthfulness as they did when they initially filed their applications. Further, as pointed out by Marmet and Sun Over Jupiter Broadcasting, Inc. (Sun Comments at p. 7), proposals would be subject to the scrutiny of hearing and cross-examination. Therefore, allowing parties to amend their applications to reflect any new comparative criteria that the Commission may adopt would not provide these parties with an opportunity to "manipulate" the Commission's Rules or to create "sham" organizations any more than when they initially filed their applications.

A variation on the opposition to opportunity for amendment is proposed by Bechtel & Cole, Chartered, who claim that "[w]hen a party to an existing comparative proceeding *has* challenged the integration criterion, his or her opponents should *not* be granted liberties to reform their applications. (Comments of Bechtel & Cole, p. 6; emphasis in original). The problems with this suggestion are several.

First, with one exception in the cases in which the FM Applicants are in hearing (MM Docket No. 91-100), in which a client of Bechtel & Cole, John W. Barger, attempted to offer evidence in

alternative to integration,[4/] the FM Applicants submit that nearly all other challenges to the integration criterion were made by comparatively inferior applicants only after the release of the D.C. Circuit's first Bechtel decision. *See* Bechtel v. F.C.C., 957 F.2d 873 (D.C. Cir. 1992). They never before sought to offer any alternative evidence. In all those other cases involving the FM Applicants, the challenges to integration were made by applicants that had initially sought evaluation under the Commission's then-existing comparative factors. So, even assuming *arguendo* a variation of Bechtel & Cole's suggestion were to be adopted, it would have to be limited to those applicants that had made timely challenges to integration, *i.e.*, by the appropriate cut-off date in the case.

Bechtel & Cole claims that in those cases where applicants have raised challenges to integration, "a legal issue has now been won by one of the parties and has now been lost by the other parties." (Comments, p. 6). That is not quite correct. This is only true of the winning Bechtel applicant herself. Susan M. Bechtel, the successful applicant in the Selbyville, Delaware FM Case, appealed from a final order of the Commission denying her application. The adjudication of her case resulted in reversal of the integration policy. The reversal of the integration policy in that case is now a final order with respect to the applicants in

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[4/] Interestingly, in the Round Rock, Texas FM proceeding, Mr. Barger sought integration credit and claimed comparative superiority on this basis.

that case. Applicants in the Selbyville case are presumably stuck with their existing proposals because the denial of their integration claims has been denied by final order.

Mr. Barger's situation in MM Docket No. 91-100 is substantially different. There is not a final agency order nor has there been judicial review of the Haltom City case.[5/] Notwithstanding his challenge to the integration criterion in Haltom City, he is in the same position as all other applications that have not been denied by final order.

Thus, the inherent difficulty in the proposal by Bechtel & Cole is that it would result in different treatment of similarly situated applicants, including Mr. Barger, *i.e.*, applicants in pending cases who filed their proposals when one set of criteria were in effect, only to be confronted now with different criteria for evaluation of competing applications. The Commission is

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[5/] The various court cases regarding retroactive application of rules that have been cited by Bechtel & Cole do not support their proposal.

The D.C. Circuit's decision in Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074 (D.C. Cir. 1987), is inapposite. First, like the Maxcell case, it was decided prior to Bowen. Second, it involved retroactivity by adjudication, rather than by rulemaking. Third, the D.C. Circuit was able to discern sufficient Congressional intent in the statute in question to allow for retroactivity. *Cf.* Bowen, *supra*.

Further, the specific factors in Retail, Wholesale & Department Store Union v. N.L.R.B., 466 F.2d 380, 390 (D.C. Cir. 1972), also cited by Bechtel & Cole and also an adjudication case, support the FM Applicants' arguments against retroactivity. The proposed changes represent a change in the nearly 30-year policy set forth in the 1965 Policy Statement. All the FM Applicants and nearly all other pending applicants in comparative proceedings relied upon the rules. The degree of the burden that could be imposed by retroactive application of comparative criteria is substantial -- applicants entire investment of time and money in multi-year proceedings could be wiped out if they are

proscribed from treating similarly situated applicants differently. Green Country Mobilephone, Inc. v. F.C.C., 765 F.2d 235 (D.C. Cir. 1985); Melody Music v. F.C.C., 345 F.2d 730 (D.C. Cir. 1965).

All applicants in pending cases should be afforded a reasonable opportunity to amend to meet new comparative criteria.

Conclusion

Reviewing courts have clearly concluded that administrative agencies cannot engage in retroactive rulemaking that would unreasonably burden parties who are subject to the agency's new rules. Applicants who filed applications prior to the D.C. Circuit's decision in Bechtel risk losing the financial investment and time commitment that they have invested in their desire to become a broadcast licensee. Therefore, the Commission should allow applicants in pending proceedings to amend their applications after the adoption of new comparative criteria.

Respectfully submitted,

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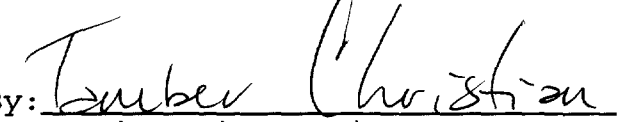
By: 

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